

CJRG – 3/23/06 Tucson Retreat  
Ideas

- Perspective from a General Counsel
  - Nature of my job
  
- I try to stay pretty close to the comings and goings in the CJ world
  - Probably closer than many of my GC colleagues, NOT because I work harder or am more dedicated than they are...
  
  - But because I work for and represent a company whose very products are interwoven into the CJ system
  
  - But I can't stay close as I'd like; I get distracted and pulled in all directions
  
  - That's why I need help from you to keep me focused on our CJ objectives
  
- General comment/Observation: The overall wellbeing of our nation's and our states' economies is ever more closely linked to the degree of balance in the CJ system

EXHIBIT 2

- The fortunes of the private sector are heavily affected by that balance
- Daimler Chrysler CEO Tom LaSorda: “Unfortunately the out-of-control legal environment in which we operate today is a big drag on U.S.-based companies’ competitiveness.”
  - Ref. recently-released Tillinghast report, too
- The job of maintaining balance in the CJ system is difficult and never “done”. It’s a constant work in progress
  - But we are clearly making progress
- A few current examples: FL HB 145 passed House 93-27 (provides for proportionate allocation of economic damages based on relative fault)
  - Critically important, common sense bill
  - Needs to navigate through the FL Senate (SB 2006)

- Note fine work in partnership with FL Justice Reform Institute and in getting Governor Bush firmly on board (J&S is “job killer the first degree”)
- PA J&S requires D to be at least 60% liable before being held J&S liable
- Has passed both chambers; eyes now trained on the governor, who has vetoed such legislation on a prior occasion
- These developments are building upon the noteworthy successes of recent years

In '05:

- + CAFA—enacted after 8 long years (Marsha) – producing good early results
- + Missouri comprehensive reform legislation signed by Governor Blount in '05 (Samina)
- + Georgia (Mark Holden and Mark Chenoweth of Koch Ind.) which passed reforms similar to MO's (also '05)
- + South Carolina in '05 also

- + TX silica/asbestos (Pickle, Ken Cohen, Chuck Beach)—sequel to ,03 reforms

In '04:

- + Ohio (Dan Steen of Owens, IL, Donn Kremel of Illinois Tool Works)
- + Mississippi (Caterpillar and MetLife – Greg Redmond)

Particularly important in light of stress being placed on CJ system post '05 hurricanes

- + On initiative front, passage of Prop 65 (Shewmaker and Schey)

A lousy way to make good public policy BUT unfortunately one that's occasionally needed

➤ Efforts to balance the courts bear mention

- Defeat of Justice McGraw in WV (Petito)
- Election of Justice Karmeier in IL (Anderson)
  - '04 (15 months ago)

- Will be challenged in this year's election cycle to maintain balance on the courts where we have it
- Will our CJ successes fuel more creative lawsuits? Present new challenges?
  - My personal view? Yes, definitely.
  - If so, do we need to consider more stringent penalties for filing frivolous lawsuits?
- Other areas we might explore more rigorously: Adding regulatory/government defenses (or exceptions) to state deceptive practices laws (ref. Price v. Phillip Morris)
  - Is plaintiff attorney exploitation of deceptive acts/practices acts the "next frontier" (I say a strong "maybe")
  - We need to match the creativity of enterprising contingency fee attorneys
- We need to stay close to reactions prompted by CJ successes

- e. g., CAFA, will our experience post-CAFA guide us to further reforms at the federal level?
- Do we need to sharpen our attention to state class actions rules to bring them into closer conformity with the federal class action rules?
- Will state AGs become more active as they are insinuated into the settlement process under CAFA?
- Another “frontier” we must recognize as a threat to a balanced civil justice system—public nuisance law-based actions that bypass the traditional requirements of product liability law.
  - Example: Rhode Island AG’s suit against paint makers
  - What jurisdiction will be next? (beyond NJ)
  - What manufacturers might be next?
  - Note how efforts to apply nuisance laws to gun manufacturers prompted Congress and the states to consider broad immunity laws

➤ The rising costs of tort litigation remain a real, everyday threat

- For a segment of our bad faith cases, average fees and expenses have risen from \$47,000 per case in '03 to \$119,000 in '05, a jump of over 150% in just 2 years
- And this is after the landmark U.S. Supreme Court ruling in SF v. Campbell circumscribing punitive damages

➤ Note the mixing of civil and criminal law, the apparent close relationship between Scruggs and AG Hood, AND a willing media

- Read March 20 release

➤ What one Steering Committee member wants members of the OC to do:

- Bring important matters to the attention of your GC; demand "face time"

- Make the tough decisions about priorities, recognizing there will always be needs greater than our aggregate financial and people resources
  - Making the tough decisions may mean forsaking some worthy projects due to the simple fact that support falls short of “critical mass”
  - It may mean we decide to fund a project at a level disproportionate to our collective interests simply because someone—the CJRT—must be the catalyst
  - It may mean pursuing some objectives with the knowledge that success may require years of effort, may face long odds, a hostile legislature, and no guarantees of eventual success
- I don’t expect—or even want—CJRG to take credit for victories
- Not our modus operandi
  - Not necessary
  - Tends to distract us from our goals



- I'm used to not taking credit for success (e.g., Campbell, Avery)
  - We must ultimately take comfort in knowing
- Q for OC: How to work optimally with local groups (or competing groups) who may have a different view of CJ priorities (e.g., WV 3<sup>rd</sup> party bad faith legislation 2 years ago; AJP in FL this year)—requires patience and calm on our part
- Playing nicely together—a continuing challenge for human beings of all ages
- We're making progress, and it's not by accident
- It's been the product of hard work
  - It's been the result of dedicated, talented people who don't give up when faced with long odds and well-funded opposition
  - It's been due largely to the contributions of many people here in this room today

- So much for my random thoughts and observations.  
What would you like to talk about? What questions  
would you like to ask me?